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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

James C. McDaniel,

Petitioner

vs.

Appraisal Institute, a Corporation Organized Under the Laws of the State of Illinois,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

Is a civil litigant entitled to a reversal of summary judgment entered against him in a "rule of reason" antitrust action against a trade association when he has proven the association controls ninety percent of the relevant market and employs subjective membership criteria?

Is a civil litigant who has proven that he was damaged by a trade associations' unfair trade practices required to find another party similarly situated in order to survive an order granting summary judgment against him?

Is a civil litigant entitled to a reversal of summary judgment entered against him when the court ignores relevant and material evidence and improperly weighs evidence in derogation of Rule 56?

Should an order granting summary judgment be reversed when the court of appeals relies on radical and unprecedented economic theory and substitutes the theory for the will of Congress?

Is there a material distinction between Civil Procedure Rules 12(b)(6) and 56(a) when the Complaint is verified by the plaintiff and states facts which the opposing party must refute?

NOTE: The only parties to this proceeding are identified on the cover. Although more defendants were listed in the cover of the Court of Appeals' opinion, all the individual defendants were dismissed by the United States District pursuant to stipulation.

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Petition for Writ of Certiorari

James C. McDaniel respectfully prays issuance of a Writ of Certiorari to review the judgment and opinion of the Ninth Circuit Court of Appeals in this case.

Opinions Below

The Amended Opinion of the Ninth Circuit Court of Appeals is published at 127 F.3d 1135 and at 97 Daily Journal D.A.R. 11,911. It may also be accessed at *http://www.vcilp.org/Fed-Ct/Circuit/9th/opinions/9417158.htm* on the Internet.

A reprinted copy of the Ninth Circuit's Amended Opinion is attached hereto as Appendix A, page 1 for the Court's convenience. The reprinted order of the United States District Court for the District of Arizona (Docket Number CV-93- 00262 -JET) is in Appendix A, page 11.

Statement of Jurisdiction

The original opinion of the Ninth Circuit Court of Appeals was entered on June 30, 1997. Both parties filed Petitions for Rehearing (Mr. McDaniel requested a rehearing *en banc*).. The Court of Appeals denied both Petitions for Rehearing and entered Its Amended Opinion on September 16, 1997. (Appendix A)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes and Rules Relevant to This Petition

The relevant statutes are the *Sherman Antitrust Act* and the *Clayton Act*. Rules 56(a), (b) and © of Federal Civil Procedure are also critical to this case.

The *Sherman Antitrust Act* is codified at 15 U.S.C. § 1:

> Sec. 1. Trusts, etc., in restraint of trade illegal; penalty
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The relevant portions of the *Clayton Act* are codified as 15 U.S.C. §§ 12 and 15:

> Sec. 12. Definitions; short title
>
> (a) ``Antitrust laws,'' as used herein, includes the Act entitled ``An Act to protect trade

and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled ``An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled ``An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled `An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February twelfth, nineteen hundred and thirteen; and also this Act.

``Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this Act contained shall apply to the Philippine Islands. The word ``person" or ``persons" wherever used

in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

(b) This Act may be cited as the ``Clayton Act".

Sec. 15. Suits by persons injured

(a) **Amount of recovery; prejudgment interest** Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining

whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

The relevant Rules of Civil Procedure which are relevant and material to this Petition are as follows:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from

the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Statement of the Case

On October 31, 1994, the Honorable Jack E. Tanner, United States District Court Judge, granted summary judgment to the Defendant Appraisal Institute ("The Institute") against the Plaintiff James C. McDaniel ("McDaniel") for the following stated reason:

> "(T)he Plaintiff has produced no probative evidence that defendants' activities are directed at anyone other than plaintiff; therefore, plaintiff has not shown that defendants' activities affect competition at large and thus violate the Sherman Act #1 under a rule of reason analysis."

In other words, the District Court believed that McDaniel, a real estate appraiser, had demonstrated damage to a competitor (himself), but not to competition.

However, McDaniel submitted evidence that the Institute virtually "owned" the commercial appraisal market in Pima County, Arizona, because its "MAI" designated members obtained more than ninety percent of the fee basis commercial appraisal assignments there. He also demonstrated that the Institute only admitted between two and seven percent of the appraisers who applied for MAI certification, which had the effect of limiting the number of appraisers who were able to effectively compete for the lucrative commercial appraisals. McDaniel also disclosed two expert witnesses who were prepared to testify at trial that MAI's market dominance directly resulted in artificially increasing the cost of commercial appraisals, proving a direct impact on interstate commerce. McDaniel also

submitted two witnesses, both deposed by the Institute, who were unable to hire McDaniel for commercial appraisal assignments because he lacked the MAI designation. Further, McDaniel submitted two witnesses, both appraisers, who were unable to effectively compete for commercial appraisal assignments because they lacked the lucrative "MAI" designation. Finally, McDaniel submitted evidence that the Institute's membership qualification process was highly subjective.

Because the District Court overlooked or chose to disregard this evidence, McDaniel appealed to the Ninth Circuit Court of Appeals for reversal of summary judgment against him.

Judge Pregerson of the Ninth Circuit was convinced that McDaniel's evidence proved the Institute violated the Sherman Act by effectively excluding him from "the product market of real estate appraisals," citing *Silver v. New York Stock Exchange* (1963) 373 U.S. 341, 348. (Concurrence) However, Judge Pregerson concurred in the majority opinion because he believed McDaniel had not proven the "relevant geographic market."

Judge Pregerson was incorrect. The "relevant geographic market" had not been disputed at the district court level and was not an issue on appeal.

The majority stated "McDaniel offered no evidence whatsoever that Appraisal Institute certification distorts competition." This statement is remarkable given McDaniel's disclosure of two expert witnesses who were ready, willing and able to provide such evidence.

Both McDaniel and the Institute petitioned the Ninth Circuit for a rehearing. McDaniel suggested a rehearing *en banc*. The Court denied both Petitions and entered an Amended Opinion on September 16, 1997.

Reasons for Granting the Writ

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT ADOPTED AN EXCEPTION TO ANTITRUST ENFORCEMENT WHICH THE SUPREME COURT OF THE UNITED STATES HAS REPUDIATED.

The Ninth Circuit excused the Institute from antitrust liability because it adopted the Institute's argument that restraint on competition is justified if the reason for the restraint is to protect the quality of the services provided. This attempt to circumvent the Sherman Act has been repeatedly repudiated by the Supreme Court. However, the Ninth Circuit has exhumed it and sanctioned it in a *published opinion*. Unless the Supreme Court steps in and corrects this aberration, group boycotts within the Ninth Circuit will be defended on the grounds that it's permissible to exclude competitors from the market if a trade association thinks the competitors' work product is "*not good enough*."

The following is from the Ninth Circuit's amended opinion:

> McDaniel has repeatedly been rejected based upon failure to obtain sufficient credits for specialized appraisal experience. It is not

> that he has not performed commercial appraisals for at least three years. *His problem is that the Institute does not think his appraisals were good enough.*

(Appendix A; emphasis added)

This accurately states the reason the Institute denied McDaniel membership: he just wasn't "good enough." However, the evidence demonstrates that McDaniel satisfied every *objective* test of membership: (1) he has the requisite education; (2) he passed all of the written examinations required for membership; (3) he submitted satisfactory demonstration appraisals; (4) he successfully completed the necessary continuing education requirements.

This is what kept him out of the commercial appraisal market: an "experience review committee" comprised of local competitors looked at his work product and decided -- with no objective criteria -- that it wasn't "good enough."

And that was "good enough" for the Ninth Circuit.

However, it is not "good enough" in the context of a motion for summary judgment. The Ninth Circuit weighed the evidence, ignored McDaniel's evidence, and adopted the Institute's argument that McDaniel's work product is inferior. The District Court did not even go that far. But the Ninth Circuit blamed McDaniel's alleged "inferiority" on his loss of commercial appraisal work to MAI-designated appraisers:

> "He was at a disadvantage compared to MAI appraisers because he did not have an MAI certification. But that is no different in principle from the disadvantage of a seller of a lower quality product has against a higher quality product..." (Exhibit A)

This is judicial error because it is a finding of fact. McDaniel's evidence disputed the allegation that his work product was inferior. He submitted evidence that his critics were biased against him and reviewed his work product as Experience Review Committee members despite their bias. However, the Ninth Circuit adopted as a factual finding the Institute's unsuported argument that his work product was "inferior."

A review of the "Facts" portion of the Ninth Circuit opinion is revealing. The Court spends more than half of the "Facts" section repeating the words of McDaniel's critics, in which they accused him of using "bogus data," among other things. The Court, however, ignored the fact that the Institute recanted the allegations after McDaniel challenged them. McDaniel submitted a letter from the Institute's Chicago headquarters exonerating him of the phony allegations of his critics on the Experience Review Committee. (Appendix A) It is also noteworthy that McDaniel did not know who had submitted the letter and was not aware that *the same individuals later sat on the experience committee which denied him credit.*

After the lengthy paragraph recounting the allegations of McDaniel's critics the Ninth Circuit dismisses McDaniel's evidence with one sentence: *McDaniel claims that the membership process is too subjective.* Nothing

more is said. No mention is made of the fact that McDaniel's "claims" were backed up by evidence. And, sadly, nothing was said of the proven fact that the *subjective* element of the membership process is the part that kept him from membership -- not the objective elements. McDaniel possessed the necessary education, completed the continuing education courses, passed the requisite battery of tests and successfully completed several demonstration appraisals. He even was awarded four years' worth of the necessary five years of experience credit. However, his competitor/critics on the Experience Review Committee denied him the final year of credit, claiming his work was simply "not good enough."

McDaniel initially points out that this "good motive" argument does not -- cannot -- cure a restraint of trade. Numerous trade associations with market dominance have kept potential competitors out of the market by denying them membership because the competitors weren't "good enough." Such a "good motive" defense does not excuse a group boycott. *National Society of Professional Engineers v. United States* 435 U.S. 679, at 693 (1978); *Associated Press v. United States* 326 U.S. 1 (1944); *Fashion Originators' Guild v. FTC* 312 U.S. 457 (1941).

The Ninth Circuit suggests the Institute's suppression of its membership actually "enhances competition and efficiency of markets by reducing search costs and mistakes." (Appendix A) So enamored was the Court over the "good enough" argument proffered by the Institute that it overlooked the obvious: you can't enhance competition by eliminating competitors.

II.

THE INSTITUTE'S SUBJECTIVE ADMISSIONS CRITERIA SUPPRESSES COMPETITION AND DAMAGES THE MARKETPLACE. THE NINTH CIRCUIT'S OPINION IS IN DIRECT CONFLICT WITH THE FIFTH CIRCUIT.

Two of the three judges on the Ninth Circuit panel -- Judge Pregerson being the exception -- wrote that "McDaniel offered no evidence whatsoever that Appraisal Institute certification distorts competition. The lack of MAI status did not exclude McDaniel from the commercial work he wanted; consumer choice did." However, the Fifth Circuit, in a similar trade association antitrust action, found that a trade association violated the Sherman Act when it dominated the market and employed subjective membership criteria. *United States v. Realty Multi-List, Inc.* 629 F.2d 1351 (5th Cir. 1980). The Court found the defendant trade association had sufficient market power to require scrutiny of its admissions process.

There is no definitive mathematical test for a finding of significant market power. The test is competitive advantage. If a certain group enjoys a competitive advantage -- if it does not compete on *equal terms* with non-member competitors -- then it has significant market power. "There exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources." *Id.* "(O)ne may determine whether the association possesses sufficient economic power 'to shape and influence the economic environment of the particular field involved.'"

Realty Multi-List, at 1370, quoting Austin, *Real Estate Board and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L.Rev. 1325, at 1345-1346. The Court in *Realty Multi-List* weighed whether the defendant was of "sufficient economic importance that exclusion results in the denial of the opportunity to compete effectively on equal terms." *Id.*, at 1373. "We do not set strict mathematical standards regarding the level of market power which must be shown in any given case." *Id.*, at 1374.

The evidence shows that the Institute's members receive more than ninety percent of the commercial real estate appraisal assignments in both the public and private sectors in Pima County, Arizona. (Appendix A) That is a far higher percentage than the members of the listing service enjoyed in *Realty Multi-List*. In fact, McDaniel has not found a case with a higher market dominance than that enjoyed by the members of the Institute in Pima County, Arizona.

The Fifth Circuit recognized that such market dominance by a trade association, coupled with subjective membership criteria, is a "red flag" which demands close judicial scrutiny. The Ninth Circuit, unlike the Fifth, failed to recognize the threat presented to the competitive marketplace.

The Fifth Circuit relied on this analysis of trade associations by Professor Lawrence A. Sullivan of the University of California School of Law in Berkeley:

> "A self-policing program with a seal of approval intended to influence customers has an inevitable tendency to function like a

> boycott -- to persuade customers to avoid non-approved industry members, thus making it harder for them to compete. Once it is concluded that the program is not an objective one, no further evaluation of benefits to competition which are supposed to flow from the program is appropriate. The potential for harm is so great and the potential for off-setting benefits so small *when the program is not objectively run*, that the courts will decline to weigh and measure the harms and benefits and will treat the program precisely as they do an explicit boycott."

Sullivan, *Handbook of the Law of Antitrust*, West Publishing Co. 1977, page 249. (Emphasis added.) The Fifth Circuit recognized the wisdom of Professor Sullivan's analysis. The Ninth Circuit chose to ignore Professor Sullivan's analysis and, as a consequence, reached the opposite conclusion from the Fifth Circuit in a case with material facts which are quite similar to those of *Realty Multi-List.*

However, the Fifth Circuit's analysis is consistent with prior rulings of the Supreme Court such as *Hoover v. Ronwin* 466 U.S. 558. Justice Stevens wrote at page 600:

> The rule of law that applies to this case is applicable to countless areas of the economy in which arbitrary restraints on entry may impose the very costs on the consuming public which the antitrust laws were designed to avoid. Experience in

> administration of the Sherman Act has demonstrated that there is a real risk that private associations that purport merely to regulate professional standards may in fact use their powers to restrain competition which threatens their members.

If the Ninth Circuit had acknowledged McDaniel's evidence of subjective membership criteria -- instead of casually dismissing it without comment or analysis -- this case would be headed back to Tucson for trial.

It is imperative to recognize the subjective Experience Review Committee process is applied to every candidate for MAI membership, not just to McDaniel. Other candidates who had satisfied objective criteria were denied admission on account of the subjective criteria. McDaniel proved the only MAI candidates who overcame the experience review hurdle had already been working for Institute members, usually as "apprentices." McDaniel also showed that, under the rules of the Institute, the "apprentices" were able to *select the members of the Experience Review Committee.*

III.

THE NINTH CIRCUIT MISAPPLIED McDANIEL'S CASE AUTHORITIES IN DETERMINING THAT THE INSTITUTE'S RESTRICTIVE MEMBERSHIP PROCEDURES HAD NO EFFECT ON COMPETITION; THE NINTH CIRCUIT DEVIATED FROM THE RULINGS OF OTHER CIRCUITS.

Both the District and the Ninth Circuit ruled that McDaniel must demonstrate that another person was damaged by the Institute's restrictive membership practices in order to prevail. This is not the law in any circuit. In fact, until this case, it was not the law in the Ninth Circuit. Antitrust plaintiffs do not have to show that another person was injured by the same device that injured them. However, as noted, McDaniel showed that every non-apprentice during the years in question failed to gain membership. The fact that the apprentice-candidates were able to makeup of their individual Experience Review Committee -- while McDaniel and other non-apprentices could not -- undoubtedly contributed to this result.

What plaintiffs must show, as in *Pinhas* v. *Summit Health, Ltd.* (9th Circuit 1989) 894 F.2d 1498, is that they were injured as the result of anticompetitive activity. In *Pinhas*, as in the case at bar, a single plaintiff alleged injury as a result of a negative peer review -- in Pinhas' case, that of a hospital committee. Addressing the issue of individual harm versus effect on competition at large, the Court held that "Pinhas must show that 'as a matter of practical economics' the activities of the appellees -- the peer review process in general -- have a 'not insubstantial effect on the interstate commerce.'"

And, "He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." (Citations omitted.) "The preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. Or Pinhas may show that his preclusion otherwise substantially reduced total competition in the market. We therefore conclude that Pinhas has adequately pleaded injury to competition." *Id.*, at 1032.

The Ninth Circuit disregarded *Pinhas* because *Pinhas* was dismissed under Rule 12(b)(6), not Rule 56. (Appendix A)

However, the Ninth Circuit ignored evidence that the procedures of the Institute which barred McDaniel's membership did, in fact, affect competition. Fewer competitors means less competition, which translates into higher prices.

On August 26, 1994, McDaniel disclosed Dr. Ron Vogel as an expert witness. Dr. Vogel was subsequently included on the Proposed Pre-Trial Order. The Institute has known for quite some time that Dr. Vogel is prepared to address the market impact of The Institute's peer review process.

The formal disclosure of Dr. Vogel reads:

> "Dr. Vogel has researched the economics of trade association peer review procedures and the impact of same on interstate commerce.

> His experience relates directly to the admissions mechanism employed by the Defendant Appraisal Institute. He is providing expert witness assistance, and possibly testimony, in current antitrust litigation relating to members of the medical profession in Arizona. He will relate his opinions regarding subjectivity in peer review and admissions by trade associations, specifically, that such subjectivity has the effect of artificially suppressing membership and that such suppression, at least in some cases, has a deleterious effect on interstate commerce. Dr. Vogel is expected to conclude that the admissions criteria employed by the Defendant Institute is subjective, and that the subjectivity of the criteria artificially suppresses the number of MAI's, resulting in a higher cost of commercial appraisal services than would be the case if there were MAI-designated commercial appraisers."

James Sanders, an economist who was also designated as an expert witness by McDaniel, is also prepared to testify that The Institute's flawed admissions process impacts upon the market and increases the cost of commercial appraisals. Mr. Sanders was deposed twice by The Institute. His anticipated market impact conclusion testimony was stated in an offer of proof during Part III of McDaniel's deposition (from page 292 of the transcript) :

> "MR. WINE: ... Then you also mentioned that Jim Sanders had formulated additional

> opinions about monopoly issues or something like that?
> MR. TULLY: I wouldn't say that he formulated additional opinions. The opinions were there and available at the time of his depositions. But he was prepared at the time and is prepared to elaborate on monopoly issues by presenting to you a market analysis in support of our monopoly theory indicating that the market would be assisted if in fact there were more members of the Institute, more MAI's, that the cost of commercial appraisals in the relevant market, which is Arizona, would in fact be lower.
> MR. WINE: If there were more MAI's?
> MR TULLY: If there were more MAI's, yes."

The anticipated testimony of Messrs. Vogel and Sanders must be taken into account by a court reviewing an appeal from summary judgment. *Celotex Corporation v. Catrett* 477 U.S. 317 (1986).

Further, the reliance on the distinction between Rule 12(b)(6) and Rule 56 is not as dispositive as the Court suggests. The Court noted that it is sufficient to plead that the removal of a competitor may affect competition and possibly drive up the prices surviving competitors charge for their services. The Court acknowledged that the removal of Pinhas from market "could conceivably" injure the marketplace and reduce competition. If such an outcome is "conceivable" -- that, under the facts pleaded it *might happen* -- then the *Pinhas* outcome would have been the same under a summary judgment profile. The reason is that a "could conceivably happen" test is a *question of fact.* If an

event "could conceivably happen" then a trier of fact must determine whether it did, indeed, happen. In order to prevail on a motion for summary judgment, the moving party would have to refute the "might have happened" test by presenting evidence that the removal of the competitor had no effect on competition. In that profile, a claimant such as McDaniel would have to present evidence that there is, at least, a question of fact. However, the Ninth Circuit erroneously placed the burden on McDaniel, not the Institute.

When the Ninth Circuit in *Pinhas* ruled that removal of a competitor "could conceivably" violate the Sherman Act it identified a question of fact every court reviewing a single-plaintiff Sherman Act would have to resolve. Under *Pinhas* McDaniel had clearly submitted that his removal "could conceivably" effect the Pima County commercial appraisal market by reducing competition and allowing Institute members to charge higher prices as a consequence. The Court overlooked the fact that this was not an abstract argument: it was McDaniel's opinion. That opinion, even if expressed in a Complaint, is a statement of fact.

It is axiomatic that a sworn statement constitutes an evidentiary fact. The Ninth Circuit, in misapplying *Pinhas*, clearly overlooked the fact that the Complaint filed in this case was *verified* by the Plaintiff. Consequently, McDaniel had presented evidence of injury to competition and the Institute had the burden of submitting evidence refuting McDaniel's pleaded assertion. The Ninth Circuit, however, reversed the burden, let the Institute off the hook, and required that McDaniel submit even more evidence. This is the exact opposite of the way Rule 56 is supposed to work. *Celotex Corporation v. Catrett* 477 U.S. 317 (1986).

The Ninth Circuit also erred in rejecting *Realty Multi-List*. This is how the Ninth Circuit attempted to distinguish the instant case with *Realty Multi-List*:

> "In *Realty Multi-List*, no one could buy a house listed in the multiple listing service without dealing with someone in the group. Anyone can buy appraisal services without dealing with the Appraisal Institute."

This is just plain wrong. Nobody in Pima County could "buy" MAI appraisal services without dealing with someone in "the group" (the Institute). And anybody could market a house in the *Realty Multi-List* market without dealing with the listing service. The Ninth Circuit apparently overlooked the fact that a residential seller in the *Realty Multi-List* market could avoid the listing service. However, that seller would be at a competitive disadvantage, because the listing service controlled more than half of the relevant market. Mr. McDaniel's situation is exactly the same as the non-members in the *Realty Multi-List* market: he can offer his services, but faces a competitive disadvantage because most of the market is controlled by an association which has denied him membership. When the Ninth Circuit says McDaniel can compete freely, it is ignoring the reality of the market. The reality is that McDaniel can compete for less than ten percent of the commercial real estate appraisal market, because the members of the Institute monopolize the other ninety percent. It borders on the disingenuous to argue that he can compete fairly. *Macdonnell v. Michigan*

Chapter #10 of AIREA 587 F.2d 7 (6th Cir. 1978);[1] *U.S. v. Realty Multi-List. Inc.*. 629 F.2d 1351 (5th Cir. 1980); *Mardirosian v. American Institute of Architects* 474 F.Supp. 628 (District of Columbia 1979); *Thompson v. Metropolitan Multi-List. Inc.*. 934 F.2d 1566. 1582 (11th Cir 1991); *Kreuzer v. Am. Academy of Periodontology* 735 F.2d 1479. 1490.

IV.

THE COURT HAS EFFECTIVELY OVERRULED *CELOTEX* IN THE NINTH CIRCUIT

The opinion of the Ninth Circuit effectively negates *Celotex* in this region. Evidence submitted by McDaniel has been ignored in favor of rebuttal evidence submitted by the Institute. The Ninth Circuit has made evidentiary decisions which are properly within the purview of the trial court and. as noted earlier. misapplied the burden of proof. The instant case repudiates *Celotex* and turns Rule 56 inside-out.

The Ninth Circuit disregarded evidence of subjective membership criteria. The Court acknowledged that McDaniel submitted such evidence. However. it ignored the evidence and adopted that of the Institute. This is erroneous on review of a summary judgment and grounds for reversal.

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This case also involved the Institute and its restrictive membership criteria. The Sixth Circuit noted: "It is clear that the plaintiff was barred from bidding on appraisals that required an MAI designation." McDaniel was barred from bidding on appraisal work for witnesses Macholtz and Jones, who corroborated this in deposition.

The Court also erred by disregarding McDaniel's disclosure of two expert witnesses who were prepared to testify about the marketplace impact of the Institute's subjective admissions criteria. *Celotex* makes it clear that such disclosure has evidentiary weight. A court cannot ignore such disclosure unless the opposing party demonstrates the disclosed opinions have no basis in fact.

The Institute never shouldered its burden of proving that the offered opinions of Mr. Sanders and Dr. Vogel were unfounded. The Court of Appeals excused the Institute from this obligation, in violation of *Celotex*.

> Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted with Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact.

Celotex, at page 328.

Neither the District Court nor the Court of Appeals required the Institute to make this showing.

V.

THE NINTH CIRCUIT RELIED ON RADICAL AND UNFOUNDED ECONOMIC THEORY.

The element of the Ninth Circuit's opinion which poses the most danger to antitrust law is the Court's adoption of a questionable "lemon" theory articulated in a work entitled *Memoirs of An Unregulated Economist*. This economic theory is based on the premise that consumers can't make informed decisions in a free market and that they need trade associations to confine their purchasing decisions to "good enough" providers.

This contemplates a dreadful precedent. Nothing offends a free marketplace more than an economic theory which purports to protect consumers from their own decisions. This Court should soundly repudiate the Ninth Circuit's radical departure from proven and accepted economic theory. There is no reason to substitute the free marketplace with a marketplace confined to the "acceptable" competition provided by a trade association. This case threatens the fabric of the American economy by substituting a few "acceptable" competitors for market-driven consumer choices.

> The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The heart of our national economic policy long has been faith in the value of competition.

Professional Engineers 435 U.S. 679, at 695.

Further:

> Even assuming occasional exceptions to the presumed consequences of competition, *the statutory policy precludes inquiry into the question whether competition is good or bad.*

Standard Oil v. FTC 340 U.S. 231, 248. (Emphasis added.)

Chief Justice Rehnquist has denounced the practice of courts substituting their own economic theories for the express intentions of Congress:

> The Sherman Act should not be deemed to authorize federal courts to 'substitute their social and economical beliefs for the judgment of legislative bodies, who were elected to laws.'

Community Communications Co. v. City of Boulder 455 U.S. 40, at 68.

Mr. McDaniel asks: what is wrong with competition? Why can consumers not choose his services because he lacks the blessing of a trade association? Why is he banned from the market?

The answer: because the Ninth Circuit has bent antitrust law out of shape and permitted his banishment from the market. Only the Supreme Court can step in and correct this aberration of justice and economics. Unless this Court steps in, the free operation of the marketplace in the Ninth

Circuit will be jeopardized by the aberrant ruling of *McDaniel* v. *Appraisal Institute* in the reported opinion dated September 16, 1997.

VI.

THE COURT OVERLOOKED THE FACT McDANIEL'S DAMAGES ACCRUED BEFORE ARIZONA ADOPTED LICENSING PURSUANT TO *FIRREA*.

The Court of Appeals stated:

> McDaniel's freedom to compete in the appraisal market was protected by federal law, which requires various federal agencies not to exclude a certified or licensed appraiser "solely by virtue of ... lack of membership in any particular organization." (Appendix A)

The Court was referring to the legislation commonly known as FIRREA, also referred to as the "Savings and Loan Bailout." The reliance of the Court is misapplied for two salient and compelling reasons:

1. The language was the direct result of a plethora of phony and fraudulent real estate appraisals accomplished by members of the Institute (MAI's). The negligence, conspiracy and outright fraud of many Institute members played a major part in bringing about the savings and loan disaster of the 1980's.

2. Arizona did not institute licensing of professional real estate appraisers until 1992. Most of McDaniel's damages accrued before that date.

The Ninth Circuit must have a short memory. Otherwise, why would it recommend turning over the marketplace to the Institute? The respondent Institute was partially responsible for one of the largest financial catastrophes in the history of this country. Nonetheless, the Ninth Circuit is willing to replace the "judgment" of the Institute for the free operation of the marketplace and the sound judgment of consumers. Even absent the recent history, the Ninth Circuit's ruling is unfounded and wrong. However, in the context of recent history, the decision by the Ninth Circuit is appalling.

VII.

CONCLUSION

Based on the foregoing argument and the compelling national interest implicated by the Ninth Circuit's decision in this case, the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 15th day of December, 1997.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES C. MCDANIEL,
Plaintiff-Appellant,

v.

APPRAISAL INSTITUTE, a Corporation Organized Under the Laws of the State of Illinois, fka American Institute of Real Estate Appraisers of the National Association of Realtors; DAN W. MAHONEY, Husband; SUSAN MAHONEY, Wife; SANDERS SOLOT, Husband; RUTH-JEAN SOLOT, Wife, et al.,
Defendants-Appellees.

No. 94-17158
D.C.No.
CV-93-00262-JET
ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
February 16, 1996--San Francisco, California

Filed June 30, 1997
Amended September 16, 1997

Before: Joseph T. Sneed, Harry Pregerson and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld;

Concurrence by Judge Pregerson

COUNSEL

Mike Tully, J. Michael Tully, Tucson, Arizona, for the plaintiff-appellant.

Howard R. Wine, Law Office of Howard R. Wine, Tucson, Arizona, for the defendants-appellees.

ORDER

The concurring opinion, filed June 30, 1997, is amended as follows:

Delete the first full sentence on Slip Opinion page 7592, starting with "The Institute . . . " and replace it with: "The Institute only accepts between two and seven percent of its candidates, and MAI appraisers get over 90% of the commercial business in Southern Arizona."

With the above amendment, the appellant's petition for rehearing and suggestion for rehearing en banc is DENIED. The appellee's petition for rehearing is also DENIED.

OPINION

KLEINFELD, Circuit Judge:

McDaniel was denied certification as an "MAI appraiser" by the Appraisal Institute, a private nonprofit professional association. The only issue in this appeal is whether he established a genuine issue of material fact, in his Sherman Act, section 1 antitrust claim.

Facts

McDaniel has repeatedly sought certification as a Member of the American Institute of Real Estate Appraisers. An appraiser does not have to be a Member of the Appraisal Institute in order to do business. But, according to McDaniel's evidence, MAI appraisers get over 90% of the commercial business in Pima County, Arizona, where he works. The non-MAI appraisers like McDaniel are left mostly with less lucrative residential appraisals.

The Appraisal Institute is a private nonprofit group which publishes materials on appraising, provides continuing education for appraisers, and certifies people whom it judges to be very highly competent by its standards. To be an MAI appraiser, one must complete a continuing education program, pass a comprehensive examination, demonstrate at least five years of general appraisal experience, obtain credit for three years of specialized appraisal experience and satisfy a "good moral character" requirement.

McDaniel has repeatedly been rejected based upon failure to obtain sufficient credits for specialized appraisal experience. It is not that he has not performed commercial appraisals for at least three years. His problem is that the Institute does not think his appraisals were good enough. In 1985, for example, the admissions committee stated that there was "massive fraud in his presentation and manipulation of data to achieve a desired answer." They claimed that he used "totally bogus data" such as using the same comparable at $4.25 per square foot and $7.74 per square foot according to what gave the desired answer, and that "this type of fraudulent reporting appeared in most of his 1980, 1981 and 1982 work. " With respect to other commercial properties, the admissions com-

mittee said that McDaniel used "fictitious comparables." The admissions committee also noted defects which might be considered competence rather than honesty issues, such as discounting value by only 20% for property that was "flooded in the rainy season [because it was] actually within the channel of the Tanque Verde Creek." They also noted an appraisal report depreciating a twelve year old building by only 6% and not adjusting value of comparables for location.

McDaniel claims that the membership process is too subjective. He sued the Appraisal Institute and a number of its members who acted on his application for admission. He claims that because the Appraisal Institute dominates commercial appraisal in southern Arizona, and excludes him, it is an illegal conspiracy in restraint of trade under the Sherman Act, 15 U.S.C. S 1.

Analysis

The district court granted summary judgment against plaintiff, and we affirm. "[S]ummary judgment on an antitrust claim may be appropriate," Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1409 (9th Cir. 1991), and we review de novo. Id. at 1408. Defendants have argued that much of plaintiff's evidence was not cognizable, for lack of personal knowledge or other defects, but the district court did not rule on their motion to strike. We find it unnecessary to decide whether the motion should have been granted, because even considering the challenged evidence, on de novo review, we reach the same conclusion as the district court.

[1] To demonstrate a violation of section 1 of the Sherman Act, the plaintiff must show, among other things, that the defendant "unreasonably restrained trade under either a per se

rule of illegality or a rule of reason analysis. " Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1410 (9th Cir. 1991). McDaniel does not argue that Appraisal Institute certification is a per se violation, like horizontal price fixing. See id. That limits him to "rule of reason" analysis. To apply "rule of reason" analysis, to this claim, we look for "the actual effects that the challenged restraint has had on competition in a relevant market." Id. McDaniel has submitted no evidence of any purchases or sales made through the Appraisal Institute. Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 472 U.S. 284 (1985).

McDaniel argues that this case is analogous to Pinhas v. Summit Health, Ltd., 894 F.2d 1024 (9th Cir. 1989). We disagree. That was a 12(b)(6) case, this is a summary judgment case, so in the case at bar, unlike Pinhas, it was incumbent on plaintiff to present evidence. Also, the claims are different with respect to the effects of the putative restraint on competition in a relevant market. Pinhas was an ophthalmological surgeon. When Medicare reimbursement for assistants became unavailable, he proposed to operate without assistants, but the hospital insisted on keeping a requirement that they be used. He was not permitted to perform surgeries at the hospital without them. We held that facts could be proved within the allegations showing an adverse affect on competition in the relevant market, on the theory that if Dr. Pinhas's unassisted surgeries were barred by the hospital, the other surgeons would have less competitive pressure on their fees.

[2] Because the case at bar is an appeal from a summary judgment, it was incumbent upon the plaintiff to oppose it with evidence of "injury to the competition in the relevant market" as an element of his Sherman Act claim. Id. at 1032.

It is not enough for McDaniel to show that a competitor, himself, was injured by the Appraisal Institute's certifications. Id.; Oltz v. St. Peter's Community Hospital, 861 F.2d 1440, 1448 (9th Cir. 1988). McDaniel did not submit evidence that competition was injured. The evidence showed without contradiction that McDaniel competed freely in the appraisal market in Pima County. He was at a disadvantage compared to MAI appraisers because he did not have an MAI certification. But that is no different in principle from the disadvantage of a seller of a lower quality product has against a higher quality product; it must sell the product for less money, make its product available more conveniently, or otherwise give consumers a good reason to buy it. McDaniel was free to compete with the MAI appraisers for every job.

[3] McDaniel offered no evidence whatsoever that Appraisal Institute certification distorts competition. The lack of MAI status did not exclude McDaniel from the commercial work he wanted; consumer choice did. McDaniel's freedom to compete in the appraisal market was protected by federal law, which requires various federal agencies not to exclude a certified or licensed appraiser "solely by virtue of . . . lack of membership in any particular appraisal organization. " 12 U.S.C. S 3352(d).

[4] On its face, the Appraisal Institute's certification program enhances competition and efficiency of markets by reducing search costs and mistakes. See Consolidated Metal Prod. v. American Petroleum Institute, 846 F.2d 284, 296 (5th Cir. 1988) ("Because product information reduces uncertainty, it both increases consumer demand for the product and encourages producers to prove their products."); National Association of Review Appraisers v. Appraisal Foundation, 64 F.3d 1130, 1133 (8th Cir. 1995) ("Establishing and

enforcing" membership, educational, and ethical criteria "may even serve some pro-competitive purposes by increasing the relative market efficiencies."). In practical terms, a seller or borrower hiring an appraiser would have to spend hours on the telephone to check on an unknown appraiser before hiring him, were it not for a certification process felt to be sufficiently reliable to substitute for individual investigation. Thus a trusted certification makes it cheaper, in terms of the cost of gathering information, to hire a stranger, so strangers can compete more effectively with those dominating a local market. Other things being equal, this increased competition and reduced transaction cost will reduce prices. To the extent that prices of some appraisers are likely to be increased by certification, the increment reflects more knowledge by consumers of quality differences:

> The role of information in economic theory has expanded rapidly. . . . George Akerlof presented an interesting theory of "lemons." Suppose that only sellers of used automobiles know their quality. Potential buyers will correctly assume that the owners of inferior-quality automobiles will be especially eager to sell their cars, so these potential buyers will offer only as much as the poorest quality car is worth - and that will be the only quality that sellers offer for sale. (This vicious circle can be broken if sellers can acquire deserved reputations for reliability.)

George J. Stigler, Memoirs of An Unregulated Economist 80-81 (1988). "MAI" provides information in much the same manner as a name brand.

The most analogous case we have found is Sanjuan v. American Board of Psychiatry and Neurology Inc., 40 F.3d

247 (7th Cir. 1994). In that case psychiatrists passed the written examinations for their boards, but failed the orals. The American Board of Psychiatry and Neurology, like the American Institute of Real Estate Appraisers, was a private association which certified achievement of a standard of excellence. Like the Appraisal Institute, the Board did not control licensing, and an individual could practice psychiatry without board certification. The Seventh Circuit reached the same conclusion we do, that there was no antitrust injury, because "plaintiffs already are sellers in the market for psychiatric services; turning down their application for certification does not remove their output from the market and therefore does not raise prices to consumers." Id. at 251; see also Consolidated Metal Prod. v. American Petroleum Institute, 846 F.2d 284, 293-94 (5th Cir. 1988) ("the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations").

Nor is the case at bar like the real estate brokers listing cases, of pooled listings, cooperation, and commission splitting. United States v. Realty Multi-list, Inc., 629 F.2d 1351 (5th Cir. 1980). In Realty Multi-list, no one could buy a house listed in the multiple listing service without dealing with someone in the group. Anyone can buy appraisal services without dealing with the Appraisal Institute. Indeed, so far as the evidence shows, buyers and sellers of appraisal services do not deal with the Appraisal Institute at all. The buyers of appraisal services hire the sellers individually. There can be no cartel where there are no price restrictions, no productionrestrictions, and no market share arrangements, explicit or tacit, among the competing entrepreneurs.

AFFIRMED.

PREGERSON, Circuit Judge, concurring in the result.

I concur in the result. I write separately because, unlike the majority, I believe that McDaniel has demonstrated that the Appraisal Institute ("Institute") has effectively excluded him from the product market of real estate appraisals. The majority concludes that because McDaniel is not completely barred from the product market, the Institute does not have sufficient market power to violate Sherman Act S 1. Majority Op. at 7591. All that is required for a S 1 violation, however, is an effective exclusion from the product market."[W]hen the cooperating group possesses sufficient market power that a nonmember can no longer compete effectively with members, the restraint must be found to have sufficient adverse competitive impact to violate Section 1." United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1373 (5th Cir. 1980); see also Silver v. New York Stock Exch., 373 U.S. 341, 348 (1963) (noting that a stock broker is effectively excluded from the product market when his nonadmission to a listing service deprives him of a significant volume of trading). The Institute only accepts between two and seven percent of its candidates, and MAI appraisers get over 90% of the commercial business in Southern Arizona. Given these figures, the Institute has effectively excluded McDaniel from the product market for commercial real estate appraisals.

Nevertheless, McDaniel has provided no evidence of the relevant geographic market. "[T]he factual support needed to show injury to competition must include proof of the relevant geographic . . . market[ ] . . . ." Les Shockley Racing, Inc. v. National Hot Rod Ass'n, 884 F.2d 504, 508 (9th Cir. 1989).

Although McDaniel argues that Southern Arizona is the relevant market, he has provided no evidence to support his asser

tion. See Morgan, Strand, Wheller & Biggs v. Radiology, Ltd., 924 F.2d 1484, 1490 (9th Cir. 1991) (noting that a conclusory assertion of the relevant geographic market is inadequate).

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JAMES C. McDANIEL, a married man,	)	NO. CIV 93-262-TUC-JET
Plaitiff,	)	
-vs-	)	ORDER
APPRAISAL INSTITUTE, etc.,	)	
Defendant.	)	

THIS MATTER comes on before the above-entitled Court upon several motions by both parties.

Having considered the entirety of the records and file herein, and having heard the argument of the parties, the Court finds and rules as follows:

1. Plaitiffs' Motion to Voluntarily Dismiss all Claims Except this claim under Sherman Act §1 is GRANTED.

2. Plaintiffs' Motion to Dismiss Defendants Trotz and Wallace is GRANTED pursuant to Fed. R. Civ. P. 41 with prejudice.

3. Defendants' Motion to Dismiss all Claims Based upon Sherma Act §1 (Defense Motion II) will be construed as motion for summary judgment because this Court has considered evidence outside of the pleadings; i.e. the deposition of the plaintiff.

4. Summary Judgment is appropriate if "the pleadings, depositions,..show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c).

5. This Court, when reviewing evidence at the summary judgment judgment stage, views the evidence in the light most favorable to the non-moving party. Musick v. Burke 913 F.2d. 1390, 1394 (9th Cir. 1990). However, once the moving party produces evidence that supports their belief that no genuine issue of material fact exists, the adverse party must come forward with probative evidence which demonstrates that a genuine issue of fact remains to be tried. Celotex Corp. V. Catrett, 477 U.S. 317, 323-24 (1986). A party opposing

summary judgment may not rest on its pleadings.

Fed.R.Civ.P.56(e).

6. The Plaintiff has failed to produce any probative evidence that the defendants' conduct is per se unreasonable. Furthermore, the plaintiff has produced no probative evidence that defendants' activities are directed at anyone other than plaintiff; therefore, plaintiff has not shown that defendants; activities affect competition at large and thus violate the Sherman Act §1 under a rule of reason analysis. Therefore, Defendants' Motion to Dismiss is GRANTED. This case is dismissed as to all claims and parties.

IT IS SO ORDERED.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 31st day of OCTOBER 1994.

s/Jack E. Tanner

UNITED STATES DISTRICT JUDGE